

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED

October 19, 2010

In the Matter of A.D.S.J.M. OGDEN, Minor.

No. 297259

Allegan Circuit Court

Family Division

LC No. 09-044901-NA

In the Matter of A.D.S.J.M. OGDEN, Minor.

No. 297260

Allegan Circuit Court

Family Division

LC No. 09-044901-NA

Before: HOEKSTRA, P.J., and FITZGERALD and STEPHENS, JJ.

PER CURIAM.

In Docket No. 297259, respondent-mother appeals as of right the order that terminated her parental rights to the minor child pursuant to MCL 712A.19b(3)(c)(i), (c)(ii), (g), (j), (k)(v), and (m). In Docket No. 297260, respondent-father appeals as of right the same order that terminated his parental rights pursuant to subsections 19b(3)(c)(i), (c)(ii), (g), and (j). We affirm.

Respondents both argue that the trial court erred in terminating their parental rights to the minor child. We review for clear error a trial court's decision that a statutory ground for termination has been proven by clear and convincing evidence and its decision regarding the minor child's best interests. MCR 3.977(K); *In re Trejo Minors*, 462 Mich 341, 356-357; 612 NW2d 407 (2000).

Respondent-mother does not dispute that she voluntarily terminated her parental rights to her older daughter after the initiation of protective proceedings. Respondent-mother and her ex-husband were involved with Children's Protective Services (CPS) for domestic violence. Their older daughter and infant son were allowed to remain in respondent-mother's care. The infant boy was found dead in his crib from an accidental overdose of Benedryl. Respondent-mother tested positive for cocaine and marijuana the day after the baby died. Respondent-mother admitted that her life took a downward spiral after she lost her son. Her drug use increased and she was noncompliant with services. Respondent-mother voluntarily relinquished her rights to her older daughter, whose maternal great-grandmother adopted her. There can be no dispute that

a statutory basis existed for terminating respondent-mother's parental rights pursuant to subsection 19b(3)(m).¹ These same facts were relied upon when the trial court terminated respondent-mother's parental rights pursuant to subsection 19b(3)(k)(v). However, the trial court noted that it was troubled by the fact that the term "abuse" implied an intentional act. We agree. While a parent need not have been convicted of abuse in order for a court to find a basis for termination pursuant to the subsection, it would seem that more than mere negligence is required. For this reason, termination pursuant to subsection 19b(3)(k)(v) was erroneous.

However, as it relates to respondent-mother, the trial court did not clearly err in finding that the remaining subsections were proven by clear and convincing evidence. The facts demonstrated that respondent-mother aggressively sought out services and had made significant progress. Her only positive drug screen came in May 2009. Respondent-mother self-referred to behavioral therapist Mark Bombara in May 2009, seeking treatment for her bi-polar disorder. She also saw Dr. Bruza on June 8, 2009, who prescribed a different drug regimen for her bi-polar disorder. Bombara treated respondent-mother from May 2009 until August 2009, for a total of nine sessions. She had been making "good, moderate progress" before she had to discontinue for lack of funding. Respondent-mother was definitely aware of her shortcomings and need for improvement.

Mary Hamlin from Pathways Counseling Center had been treating respondent-mother since December 2009. Hamlin believed she was dealing with her substance abuse issues. Respondent-mother was very forthcoming and cooperative in talking about her past and discussed what she had learned in her parenting classes. She was "gaining self-confidence. She is feeling much stronger in her ability to get her life back on track, and appears to be very committed to remaining substances free, and very committed to wanting to get her – her daughter back so that she can actively parent her daughter." Hamlin believed that respondent-mother was capable of parenting the child independently and did not believe she posed a danger to the child. However, Hamlin went on to note that respondent-mother needed to complete the remainder of their sessions, another seven, at which time she would be reassessed. Hamlin also added, "I don't think that right now at this moment she is ready to fully parent; but I think [with] continued services as they open up, she certainly is moving in that direction, yes."

In terminating respondent-mother's parental rights, the trial court noted her progress but also pointed out that respondent-mother's continued relationship with substance abusers placed the minor child at risk. The trial court aptly noted that respondent-mother's progress was only part of the story. She was substance free at the time of the termination hearing, but she continued to associate with alcoholics and those with assaultive personalities. Respondent-mother was concerned about respondent-father's substance abuse and tried to encourage him to stop, but she did not feel she could "kick him out" because she believed that he was trying. Respondent-father went to AA/NA meetings, but he still tested positive, so respondent-mother

¹ At the time the trial court terminated respondent-mother's parental rights, MCL 712A.19b(3)(m) provided: "The parent's rights to another child were voluntarily terminated following the initiation of proceedings under section 2(b) of this chapter or a similar law of another state." This subsection has since been amended. See 2010 PA 7.

was unsure of whether he was attending the meetings just to appease her. Respondent-father would go out with friends, and she had no control over what he did. She acknowledged that his substance abuse had actually gotten worse since December 2009. Respondent-mother placed the minor child at risk of harm in a household where there was continued substance abuse, and she remained steadfast in her desire to stand by respondent-father. Even when asked at the hearing whether she would be willing to leave respondent-father if it meant obtaining custody of the minor child, respondent-mother balked and would only say that she would separate herself from respondent-father only temporarily until he recovered. Respondent-mother also continued a relationship with her own father, who was an abusive alcoholic that drank two 30-pack containers of beer a day. She not only maintained a relationship with her father, but she relied heavily on him for financial support. Respondent-mother had also been married to an abusive man who was in prison for domestic abuse against her. She had a habit of being with abusive addicts.

In addition, respondent-mother was simply not in a position to care for the minor child. Respondents had a home that they had lived in for approximately three months, but continued housing was tenuous in light of respondents' budget, which included "odd and end jobs" and contributions from family members. When respondent-mother was vigorously questioned about the items on their budget and those items that were not included, it was clear that respondents' housing was likely not sustainable. Neither had employment and, given their noncompliance with Work First, they were deemed ineligible for certain programs. For all of these reasons, the trial court did not clearly err in finding that the remaining statutory grounds for termination had been proven by clear and convincing evidence.

After ascertaining that the statutory grounds for termination of her parental rights had been proven by clear and convincing evidence, the trial court was then obligated to determine whether termination of respondent-mother's parental rights was in the minor child's best interests. MCL 712A.19b(5); *In re Jones*, 286 Mich App 126, 129; 777 NW2d 728 (2009). Again, there was much favorable testimony for respondent-mother. Kathy Kibby testified that she supervised many visits. Respondents played with their baby daughter on the floor and fed and changed her. Respondent-mother did most of the care taking and would "[g]ently watch[] for safety issues." There were no instances of concern as far as respondent-mother's treatment of the minor child. Respondent-mother's behavior with the child was consistently appropriate since the inception of the case. Both respondent-mother's mother and grandmother testified that respondent-mother was good with the minor child, as well as with her older daughter, with whom she still had contact.

Still, the minor child had already been in care for nearly a year at the time of the termination hearing. Respondent-father struggled with substance abuse and was many months away from demonstrating the stability needed to provide the child with an appropriate home. Given respondent-mother's attachment to respondent-father and her own long history of abuse and prior release of parental rights, the trial court did not clearly err in finding that termination of her parental rights was in the minor child's best interests.

Like respondent-mother, respondent-father showed a promising start when the case was first initiated. He underwent a substance abuse referral with Candace Ziemba on April 27, 2009. He saw Dr. Bruza in June in 2009, who prescribed Adderall and Xanax for his ADHD, anxiety, and depression. Respondent-father also treated with behavioral therapist Mark Bombara from

June 18, 2009, until July 30, 2009. Bombara wanted to continue counseling respondent-father, but funding was unavailable because respondent-father had lost his Medicaid benefits. Respondent-father's efforts waned. Although foster care worker Eric Rayl made referrals for respondents to continue substance abuse treatment, they did not do so immediately. Ziemba contacted them in June, July, and August 2009, but respondents did not appear and services were cancelled in August 2009. Location of counseling was an issue, given respondents' unstable housing, but Ziemba had indicated a willingness to come to petitioner's office for counseling immediately after respondents' visits. They were not willing. Respondent-father's excuse was lack of time, though he never had steady employment during the case.

Respondent-father eventually began counseling again in December 2009 with Pathways clinician Victor Steinbach. The initial appointment was scheduled for November 17, 2009. Respondent-father did not appear for the appointment and refused to attend because respondent-mother had not received a scheduled appointment. Respondent-father did not initiate services with Pathways until December 14, 2009, which was also after he began testing positive for marijuana. Steinbach testified that respondent-father was energetic and expressed appropriate parenting techniques. Respondent-father was making "average to above average progress," but he needed to continue with counseling for at least an additional four to six months.

Respondent-father's positive drug screens dated back to October 2009 and continued during his counseling with Steinbach. He had several positive tests for alcohol, marijuana, or both substances since the filing of the termination petition. Respondent-father admitted that he relapsed and smoked marijuana in the beginning of January 2010. Incredibly, respondent-father testified that it was the termination hearing that made him realize that he even had a problem. This was true even though respondent-father had numerous drunken driving convictions, a substance abuse evaluation, and two different therapists over the course of the year.

In addition to respondent-father's continuing substance abuse issue, he was not in a position to care for the minor child. He was unemployed and, as discussed above, respondents' budget was untenable and placed their continued housing at risk. Respondent-father argues that his poverty and lack of employment should not be used against him, but it is worth noting that respondent-father's failure to comply with Work First resulted in the loss of benefits. His actions not only cost him services and benefits but also placed respondent-mother in the same position as a member of the household.

The trial court's decision that clear and convincing evidence supported the statutory grounds for termination was not clearly erroneous. The minor child had been in care for almost a year, but respondent-father made little progress in addressing his substance abuse issue, only acknowledging that he hit "rock bottom" during the termination hearing. Because he and respondent-mother were committed to supporting one another, his decisions adversely affected respondent-mother's ability to seek custody of the minor child. Respondent-father was simply not in a position to provide the child with proper care or custody.

The trial court also did not clearly err in finding that termination of respondent-father's parental rights was in the best interests of the minor child. There was favorable testimony regarding respondent-father's visits with the minor child. He regularly attended the visits and acted appropriately. Respondent-father also regularly visited with respondent-mother's older daughter, who looked up to him. Still, the minor child had been in care for almost a year.

Respondent-father was just realizing the extent of his substance abuse issue. Even his counselor believed respondent-father would need at least an additional four to six months of therapy before being reassessed. Given the length of time that the child had been in care, such a wait was unreasonable.

Respondents also argue that petitioner did not make reasonable efforts to reunify them with the minor child. We disagree. Because respondents did not raise this claim below, we review it for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

“Reasonable efforts to reunify the child and family must be made in all cases” MCL 712A.19a(2).² A contention that reasonable efforts were not made ultimately relates to the issue whether there was sufficient evidence for termination of parental rights. *In re Fried*, 266 Mich App 535, 541; 702 NW2d 192 (2005); see also *In re Rood*, 483 Mich 73, 115-118; 763 NW2d 587 (2009) (evidence of a respondent’s participation in services provides the trial court with objective evidence necessary to its determination whether to terminate rights). Petitioner provided respondents with visitation, substance abuse evaluations, drug screens, and referrals for substance abuse treatment and for counseling at Pathways. Respondents, on their own, sought out other services such as parenting classes and treatment from Bombara. Respondents do not claim that had petitioner offered them additional services, beyond those offered by petitioner and those sought out by them, they would have fared any better. *In re Fried*, 266 Mich App at 543. Accordingly, we find no plain error affecting substantial rights.

Affirmed.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Cynthia Diane Stephens

² There are statutory exceptions to the requirement that reasonable efforts for reunification must be made, see MCL 712A.19a(2), but none apply to the present case. Specifically, there was no “judicial determination” that respondent-mother “subjected the [minor] child to aggravated circumstances” and respondent-mother’s parental rights to her older daughter were not “involuntarily terminated.” MCL 712A.19a(2)(a), (c).